

Message

From: Ryland, Renea [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=C297436CC8ED44FBAAD04CC779FED45E-RYLAND, RENEA]
Sent: 3/19/2021 2:03:58 PM
To: Eric Allmon [eallmon@txenvirolaw.com]
CC: Rick Lowerre [rl@lf-lawfirm.com]; David Frederick [dof@lf-lawfirm.com]; Marisa Perales [marisa@txenvirolaw.com]
Subject: RE: Background Material

No problem Eric. We appreciate the additional information. I'll share it with Charles and his staff. Have a good weekend! Thanks. Renea

From: Eric Allmon <eallmon@txenvirolaw.com>
Sent: Thursday, March 18, 2021 5:10 PM
To: Ryland, Renea <Ryland.Renea@epa.gov>
Cc: Rick Lowerre <rl@lf-lawfirm.com>; David Frederick <dof@lf-lawfirm.com>; Marisa Perales <marisa@txenvirolaw.com>
Subject: Background Material

Renea,

My apologies for the very long e-mail and multiple attachments, but I wanted to provide what information I could to follow up on the discussion we had yesterday.

I will note that Greg Stunz of the Harte Institute in Corpus Christi is a technical expert familiar with these issues. If EPA staff has technical questions he may be helpful on, he has said he is available to discuss with you. Here's his contact information:

Greg Stunz, Ph.D.

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I also appreciate the willingness to meet to discuss some of the programmatic problems with the Texas program. The handling of Tier 2 anti-degradation is a significant one, but there are others. Prior to filing any petition regarding delegation of the NPDES program to Texas I would engage in discussions with EPA regional staff, and I don't intend to move forward with filing such a petition soon.

Several of the attached documents are from the processing of the Port of Corpus Christi Authority's application for the discharge on Harbor Island. I realize that that particular application is at a point where TCEQ considers that EPA has no role. But, these documents hopefully give the EPA an idea of the information available to the public on these issues, and the type of analysis generally undertaken by the Executive Director's staff.

Attached are:

- (1) The July 2, 2018 interoffice memo from the Water Quality Standards team regarding the Harbor Island permit application (WQ0005253000). This type of memo is standard for all TCEQ water quality permits as the assessment of water quality standards attainment, including Tier 2. The extent of the document addressing the Tier 2 review consists of the statement, "A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Corpus Christi Bay, which has been identified as having exceptional aquatic life use." In addition to the lack of support for this statement, I'll also note that under the water quality standards a full Tier 2 review is required when there is *any* degradation. (30 TAC 307.5(b)(2)). So, even if this statement were true, it is not a finding that the lowering of water quality is *de minimis*, and so this statement does not justify not performing a full Tier 2 review. I would also note that the modeling by the applicant upon which this was based was changed significantly later on in the proceedings to reflect worse impacts with no change in position by the staff.
- (2) The dissolved oxygen (DO) memo. Again, this is a memo that is produced for each water quality permit application that I'm aware of. To my knowledge, the protestants did not contend that DO was an issue in this permit, but this is a standard memo for water quality permits, so I include it for completeness. It is very important for domestic wastewater discharge permits. There are scenarios where a saline discharge can cause impacts that result in the lowering of dissolved oxygen, though.
- (3) What has been referred to as the "Anti-degradation statement" for the Harbor Island permit. Paragraph 5 is the explanation provided essentially to justify this being considered *de minimis*. As you can see, it is very sparse. Even here, the term "*de minimis*" is not used.
- (4) The permit Statement of Basis - At page 2 this has a paragraph on the Anti-degradation analysis, but as to Tier 2 it only again includes the one sentence conclusion that no significant degradation of water quality is expected. Again, I'll note that under the water quality standards, a full Tier 2 review should be performed if *any* degradation will occur. So, in my view, even the sentence contained in the statement of basis does not justify the lack of a full Tier 2 review.
- (5) An excerpt of the portions of the ED's Response to Comments addressing this issue. Again, on the Tier 2 issue this only repeats the sentence saying, "A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Corpus Christi Bay, which has been identified as having exceptional aquatic life use." Again, the existence of any degradation should trigger a full Tier 2 review.
- (6) An excerpt of the TCEQ's water quality standards implementation procedures (IPs), which is the portion of the IP's addressing Tier 2 reviews. Although dated 2010, this is what was provided by the ED in the hearing process, and to my knowledge is the current live guidance. While I question the sufficiency of this guidance, even these procedures are not being followed for the Tier 2 review. This guidance walks through a number of situations where it says degradation is unlikely to occur, and some scenarios where it says degradation is likely. But, I have previously had a case where the anticipated water quality fell into one of the categories where it says degradation is likely, and the ED staff still made a finding that no degradation would occur. To my knowledge, TCEQ has never applied the portion of the IPs that provides guidance on the evaluation of alternatives and economic justification. That is because TCEQ has always found that every water quality permit application will have a less than *de minimis* impact.
- (7) Excerpts from the deposition of Dr. Wallace as to the steps she actually took in her anti-degradation review as the ED staff. I want to emphasize that we are not criticizing Dr. Wallace's work as an individual. Her testimony was very much in line with what other ED staff have said for Tier 2 reviews over the past more than 15 years I've been dealing with

this. She is merely taking the same approach as TCEQ staff are apparently trained to take. We believe that approach is insufficient to implement the Tier 2 requirements of 30 TAC 307.5(b)(2). At pdf page 6 a discussion of anti-degradation begins. It is at pdf page 13 (deposition page 58) that she says she does not know of any case where an applicant was asked to bring forward an economic justification under a Tier 2 review. In other words, she knows of no case where the discharge was found to be more than de minimis. It is at pdf page 14 that she is asked how one would determine whether the lowering of water quality is de minimis, to which she says that the staff are not given much time to do these reviews, that she would like to do studies as part of the permitting process, but that doesn't fit within the TCEQ rules or the federal rules. It is at pdf page 17 (deposition page 62) that she says that "an anti-deg review on a new facility is a feeling," and that she had a feeling that at this location "it was going to be OK." At pdf page 20 a discussion of baseline occurs. As you know, the Tier 2 process is supposed to account for the cumulative change in water quality since a 1975 baseline under the applicable rules. Her testimony indicates that she did not look into that. TCEQ's implementation procedures allow the use of existing water quality absent an indication that water quality has been lowered since 1975, but I've never known of the TCEQ to find that any information indicates a lowering of water quality since 1975. The questioning after pdf page 26 is from the Applicant's attorney seeking to rehabilitate her testimony, which I include for completeness. That explains some factors that she claims were part of her decision, but does not explain how the impact would be so low as to be considered "de minimis" in the case of a 95 mgd discharge.

(8) A port of Corpus Christi January 19, 2021 memo describing the approval of an contract with Parsons Environment and Infrastructure Group to evaluate the feasibility of alternatives for the disposal of the wastewater from the Harbor Island facility. This memo says, "The [Port's] team determined through ecological modeling that a 30 million gallon a day (MGD) facility was the maximum size that could be sustained at that location without impacting the bay system from the plant discharge." Keep in mind, the permit at issue at that Harbor Island location is for 96 mgd.

(8) The Parsons engineering contract, executed January 13, 2021. At page 11, this identifies alternative means of disposing of the effluent that would not involve a discharge. Again, this shows some of the type of alternatives that should have been considered with a proper Tier 2 evaluation to evaluate whether the discharge is necessary.

(9) A study by the Harte Institute regarding the various proposed locations of desalination facilities in the area, and their relative impact. This hopefully helps provide some additional technical context for the impacts involved. The Institute did this work under the direction of Frees and Nichols, who was working for the City of Corpus Christi. So, the examination of multiple sites in the bay reflects the sites they were asked to evaluate, not where they would recommend that a desalination discharge be placed.

(10) The water rights application associated with the Port of Corpus Christi Authority's La Quinta facility. (The same facility associated with TCEQ Permit WQ0005254000). It is in this application that it is stated that the water is to be used for industrial supply use, to support future manufacturing and power needs. We did not discuss 316(b) issues during our meeting, but it is the case that the water to be produced by this facility is to be used for industrial purposes, with the majority or virtually all of that water likely being used for cooling water purposes. Since this is a point source that will withdraw water to be used for cooling water purposes, it is our position that the TPDES permits for these facilities should include provisions addressing the intakes under 316(b) of the CWA. The concern is that the facilities will be built and constructed at this point without a full 316(b) review, and that later when a "downstream" customer seeks to have the intakes permitted under 316(b), the reasoning will be provided that the intakes are "existing", and thus subject to less stringent requirements than new intakes. The better approach would be to recognize that role of the intakes prior to their construction, and now permit them as such. But, that is a different issue than the anti-degradation issue.

(11) Excerpts from the City of Corpus Christi's application for a water right for its La Quinta facility (The facility associated with TCEQ Permit WQ0005290000). This application indicates that the water for that facility is to be used for municipal and industrial purposes. It also discusses that the "municipal" use of water from the Inner Harbor facility (associated with TCEQ Permit TPDES WQ0005289000) will be used to meet needs including manufacturing needs. Again, we feel like the intakes at those facilities likely are also properly considered cooling water intake structures.

(12) Texas Parks and Wildlife Department Comments regarding the Harbor Island facility. This gives some idea of the impacts of these facilities.

(13) The transcript of a September 15, 2020 meeting by the Port Authority, where it was made clear they have no intent of owning, operating or building the desalination plants being permitted, reflecting the speculative nature of the permits at issue.

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